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Public Prosecutor v Baskaran a/l Sivasamy & Ors

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–200–08 OF 2013
TENGKU MAIMUN, AHMADI ASNAWI AND ZAMANI A RAHIM JJCA
8 DECEMBER 2016

C

Criminal Procedure — Appeal — Appeal by prosecution — Respondents originally charged under s 302 read together with s 34 of the Penal Code ('the Code') — Trial court found prosecution had not proven prima facie case on original charge but had proven prima facie case for offence under s 304(a) of the Code — Trial court amended charge under s 304(a) — Respondents pleaded guilty to amended charge — Respondents convicted and sentenced to 21 years imprisonment — Whether defence afforded opportunity to test truthfulness of prosecution's witness by cross-examination — Penal Code ss 34, 302 & 304(a)

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The respondents were originally charged under s 302 of the Penal Code ('the Code'), read together with s 34 of the same ('the original charge') for the murder of one Wan Zakaria bin Hamat, the deceased. At the end of the prosecution's case, the learned trial judge found that the prosecution had failed to establish a prima facie case under the original charge but had successfully established a prima facie case under s 304(a) of the Code. The learned trial judge found, inter alia, that the prosecution's witness, PW3 who witnessed the incident had disappeared half way through his cross-examination while his crucial evidence had just begun. The learned trial judge found on the facts of the case that if the cross-examination of PW3 had been completed, the indication was that his credibility would have been shaken in the light of the contemporaneous evidence and the fact that the exchange of appointments between PW3 and the three respondents with the deceased took place in suspicious circumstances. It must be noted that the respondents in the present case contended that PW3 was an accomplice of the crime. Having found that the prosecution had successfully established a prima facie case under s 304(a) of the Penal Code, the learned trial judge accordingly amended the charge to one under the said provision ('the amended charge'). The respondents pleaded guilty to the amended charge and were each sentenced to 21 years imprisonment. Dissatisfied with the decision, the prosecution filed the present appeal. The issue for determination was whether the defence was afforded the opportunity to test the truthfulness of the evidence of PW3 by cross-examination.

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Held, dismissing the appeal and affirming the convictions and sentences by the learned trial judge:

(1) The Achilles heel beseeching the prosecution's case was the disappearance of PW3 in the midst of his cross-examination, which took place while his crucial cross-examination was about to begin. In such event the defence was deprived of the right to scrutinise the evidence of PW3, leaving the defence at a disadvantage. It prevented the defence the opportunity to put forward its case or to bring out facts through the cross-examination which may favour the respondents. Admitting evidence from an incomplete cross-examination would tantamount to allowing a witness to escape cross-examination primarily to safe guard his own interest. It would also cast doubts on the credibility and evidence of the witness. More so when the respondents here contended that PW3 was an accomplice or even the actual perpetrator (see paras 29–30).

(2) The court had no real issue with the assessment of the credit worthiness of PW3 by the learned trial judge in the light of his incomplete cross-examination coupled with other unsatisfactory features of PW3's testimony. She opined that on the facts, had the cross-examination been completed, the indication was that PW3's credibility would have been shaken. It was essentially her sole province on account of her audio visual advantage of having seen PW3 testifying before her. In conclusion, the parameters of establishing a prima facie case against the three respondents of the original charge had not been met by the prosecution. On the totality of evidence, the learned trial judge had correctly amended the charge against the respondents to one under s 304(a) of the Code (see paras 33–34).

[Bahasa Malaysia summary

Responden-responden pada asalnya telah dituduh di bawah s 302 Kanun Keseksaan ('Kanun tersebut'), dibaca bersama s 34 yang sama ('pertuduhan asal') kerana membunuh Wan Zakaria bin Hamat, si mati. Di akhir kes pendakwaan, hakim perbicaraan yang bijaksana mendapati bahawa pendakwaan telah gagal untuk membuktikan kes prima facie di bawah pertuduhan asal tetapi telah hilang separuh jalan semasa pemeriksaan balasnya manakala keterangan penting baru bermula. Hakim perbicaraan yang bijaksana mendapati atas fakta kes bahawa jika pemeriksaan balas PW3 telah selesai, petunjuk adalah di mana kebolehpercayaannya telah tergugat berdasarkan keterangan semasa dan fakta bahawa pertukaran pelantikan antara PW3 dan tiga responden dengan si mati berlaku dalam keadaan yang mencurigakan. Ia perlu ditekankan bahawa responden-responden dalam kes ini berhujah bahawa PW3 adalah rakan sejenayah dalam jenayah tersebut. Setelah mendapati bahawa pendakwaan telah berjaya membuktikan kes prima facie di bawah s 304(a) Kanun Keseksaan, hakim perbicaraan yang bijaksana sewajarnya telah meminda pertuduhan itu kepada satu di bawah peruntukan

tersebut ('pertuduhan yang telah dipinda'). Responden-responden telah mempli bersalah terhadap pertuduhan yang telah dipinda dan masing-masing telah dihukum penjara selama 21 tahun. Berasa tidak berpuas hati dengan keputusan tersebut pendakwaan telah memfailkan rayuan ini. Isu untuk ditentukan adalah sama ada pembelaan diberikan peluang untuk menguji kebenaran keterangan PW3 melalui pemeriksaan balas.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman oleh hakim perbicaraan yang bijaksana:

(1) Kelemahan kes pendakwaan adalah kehilangan PW3 semasa dia sedang diperiksa balas, yang berlaku apabila pemeriksaan balasnya yang penting baru ingin bermula. Dalam keadaan tersebut pembelaan terkilan hak utuk meneliti keterangan PW3, meninggalkan pembelaan yang lemah. Ia menghalang pembelaan satu peluang untuk mengemukakan kesnya atau mengutarakan fakta melalui pemeriksaan balas yang menyebelahi responden-responden. Dengan mengakui keterangan dari pemeriksaan balas yang tidak selesai sama seperti membenarkan saksi mengelak diperiksa balas terutamanya untuk melindungi kepentingannya sendiri. Ia juga menimbulkan keraguan berhubung kebolehpercayaan dan keterangan saksi. Lebih lagi jika responden-responden di sini berhujah bahawa PW3 merupakan rakan sejenayah atau malah pelaku sebenar (lihat perenggan 29–30).

(2) Mahkamah tidak mempunyai isu sebenar dengan penilaian berhubung kepercayaan kredit PW3 oleh hakim perbicaraan yang bijaksana berdasarkan pemeriksaan balas beliau yang tidak lengkap bersekali dengan ciri-ciri testimoni PW3 lain yang tidak memuaskan. Beliau berpendapat bahawa berdasarkan fakta, jika pemeriksaan balas itu diselesaikan, petunjuk adalah bahawa kebolehpercayaan tergugat. Pada dasarnya kuasa mutlak beliau berhubung kelebihan visual audionya adalah melihat PW3 memberi keterangan di hadapannya. Kesimpulannya, parameter untuk membuktikan kes prima facie terhadap tiga responden pertuduhan asal tersebut tidak dipenuhi oleh pendakwaan. Berdasarkan keseluruhan keterangan, hakim perbicaraan yang bijaksana telah meminda sewajarnya pertuduhan terhadap responden-responden kepada pertuduhan di bawah s 304(a) Kanun tersebut (lihat perenggan 33–34).]

Notes

For a case on appeal by prosecution, see 5(1) *Mallal's Digest* (5th Ed, 2015) para 492.

Cases referred to

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

A *Sunny Ang v PP* [1966] 2 MLJ 195, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952
Penal Code ss 34, 300, 302, 304(a)

B

Appeal from: Criminal Trial No 45B-309–10 of 2011 (High Court, Ipoh)

Asmah bt Musa (Jasmee Hameeza bt Jaafar with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
C *KA Ramu (KA Ramu Vasanti & Assoc) for the first respondent.*
Suzanawati bt Ismail (Suzana Ismail & Partners) for the second respondent.
Rao Jayanand (Rao & Kamal) for the third respondent.

Ahmadi Asnawi JCA:

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[1] The three respondents were originally charged before the High Court on a charge under s 302 of the Penal Code ('the PC'), read together with s 34 of the same.

E

[2] At the close of the prosecution's case the learned trial judge found that the prosecution had failed to establish a prima facie case under the original charge but, however, had successfully established a prima facie case under s 304(a) of the PC.

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[3] The trial judge hence amended the charge to one under s 304(a) of the same, to read as follows:

> Bahawa kamu pada 27hb Disember 2010 jam lebih kurang 12.30 malam di Restoran Lotus, No 1 Jalan Dato Dollah Off Persiaran Raja Muda Musa di dalam
G Daerah Klang di dalam Negeri Selangor Darul Ehsan, dengan niat bersama telah menyebabkan kematian Wan Zakaria bin Hamat (No KP: 740920-11-5307) dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan dan dibacakan bersama Seksyen 34 Kanun Keseksaan.

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[4] The three respondents forthwith pleaded guilty to the amended charge and were each sentenced to 21 years imprisonment commencing from the dates of their arrest (30 October 2010). Aggrieved by the whole decision, the public prosecutor mounted this appeal.

I

[5] After due consideration of the issues raised, we dismissed the public prosecutor's appeal and affirmed the convictions and sentences upon the respondents on the charge as amended by the learned trial judge. We now give our grounds.

THE CASE FOR THE PROSECUTION

[6] On 26 December 2010, at about 10.45pm, Ganesan a/l Subramaniam ('PW3') was driven to a Petronas gas station along Kesas Highway by a man known to him as Awi.

[7] Soon after a Proton Aeroback arrived and stopped behind Awi's car. One, known to PW3 as Achuan, alighted from the said Proton Aeroback and walked towards PW3 and Awi. Awi then directed PW3 to get inside the Proton Aeroback.

[8] PW3 noticed that the first, second, and third respondents were seated inside the said car. Once inside the car, PW3 was instructed to make a telephone call, to purchase RM1,000 worth of drugs commonly known as 'syabu' (methamphetamine under the Dangerous Drugs Act 1952) from Apek, whose real name was Wan Zakaria bin Hamat, the deceased.

[9] PW3 made the telephone call and the pick-up place for the delivery of the said syabu was initially agreed to be nearby the deceased's house. The deceased changed his mind and instructed PW3 to meet him at a certain Shell gas station, along Port Klang Road. PW3 and all the three respondents then headed to the agreed location. As their vehicles were approaching each other, the deceased caught a glimpse of all the three respondents in the car, prompting him to accelerate the speed of his motorcycle.

[10] The respondents gave chase and finally managed to squeeze the deceased between a stationary bus, causing him to be thrown off from his motorcycle. The deceased got up instantly and started running away. The second respondent got out of the car and ran after him. The two other respondents proceeded to give chase by using their car.

[11] The deceased ran towards a restaurant known as Lotus Restaurant. The third respondent who was driving the car, stopped and together with the first respondent, rushed out to run after the deceased. The first respondent also instructed PW3 to drive the car and to park the car by the curb in front of Lotus Restaurant.

[12] The three respondents managed to restrain the deceased inside the restaurant where they proceeded to confront and assault the deceased with 'parang', rod and 'kayu'. The deceased collapsed in a pool of blood. The incident was witnessed by a customer of the restaurant, one Kamadevan a/l Sagaran ('PW14'). However, he failed to identify the assailants/respondents.

[13] PW14 then saw the assailants ran to the car where PW3 had it parked. PW14 further said that the manager of the restaurant followed them to the car, insisting that they should remove the deceased out of the restaurant.

[14] PW3 and second respondent dragged the deceased, who was still breathing and laid him on the mosaic floor just outside the restaurant. The deceased was found dead by the police upon their arrival.

[15] The pathologist, Dr Nur Ayutimasery bt Abdullah ('PW1') who conducted the post-mortem on the deceased on 27 December 2010, concluded that the cause of death of the deceased was due to slash wounds to the head. The body bore at least 20 marks of trauma with pattern consistent with sharp force trauma. The post-mortem report is exh P5, evinced at pp 512–516, *Jld* 5, *rekod rayuan* ('RR').

FINDINGS OF THE LEARNED TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[16] The learned trial judge found the following:

(a) there were material contradictions in the evidence of PW3 and PW14:

(i) PW3 maintained at all times that the respondent had only returned to the car once the deceased collapsed whereas PW14 said that whilst the deceased was being assaulted, they stopped for a few seconds and when someone shouted 'parang!', one of the three respondents ran to the car to take out a 'parang' and assaulted the deceased;

(ii) PW3 contradicted himself when at one stage under cross-examination he said that he did not know where the 'parang' came from. At another stage he maintained that he saw the 'parang' and 'besi' inside the car and when the three respondents alighted from the car, he saw them carrying the 'parang' and 'besi';

(iii) PW14 did not identify the respondents at the crime scene;

(iv) PW14 in court said all he saw was three persons assaulting the deceased whereas in the version he gave to the police as evinced in Borang Polis 61 – Pindaan 4/86, exh P4 (at p 511 *Jld* 5, *RR*), he had said that four male Indians were involved in assaulting the deceased. It also contradicted with the version in the police report exh P176 (at p 695 *Jld* 7, *RR*) where PW14 had purportedly reported that the victim was assaulted by *beberapa lelaki India*. Again in exh P79 (at p 629 *Jld* 6, *RR*) PW14 had purportedly informed the police that the victim was assaulted by *beberapa lelaki India*;

(v) the aforesaid discrepancies had reduced the credibility and reliability of PW14. His evidence could only be taken into account if the two male Malays at the bus stop or the restaurant owner had appeared to give evidence to support his statement that he saw three men assaulting the deceased; and

(vi) PW3 was in a way an accomplice. He lured the deceased to the meeting place with the three respondents on the pretext of buying syabu. He also took over the wheel and parked the car close to the restaurant and was also seen to drag the deceased out of the restaurant;

(b) PW3 disappeared half way through his cross-examination. This was while PW3's crucial evidence had just begun. The learned judge found on the facts of the case that if the cross-examination of PW3 had been completed, the indication was that his credibility would have been shaken on account of the contemporaneous evidence and the fact that the exchange of appointments between PW3 and the three respondents with the deceased took place in suspicious circumstances. Very little therefore should have been attached to PW3's evidence; and

(c) the learned trial judge also found contradictions as to the weapons used. PW3 said that the first respondent had a 'parang', the second respondent had a chair and the third respondent had an iron rod. On the other hand, PW14 said that someone was holding a helmet, another one either holding a rod or wood and another went back to the car to fetch a 'parang'. In addition, the said 'parang' was never tendered in court. If the 'parang' was produced, it can be used in tandem with the post-mortem report and will complement the ingredient of s 302 of the PC that the wounds inflicted by the respondents on the deceased was the cause of death of the deceased and the respondents knew or have the knowledge to believe that by the causing of such injuries, it would in the ordinary cause of nature lead to the death of the deceased or that in causing the said injuries, the respondents had intended to cause the death of the deceased.

[17] For all the said infirmities, the learned trial judge ruled that the prosecution had failed to prove a prima facie case against the three respondents on the charge as proffered but only on a charge under s 304(a) of the PC. The charge was accordingly amended as intimated earlier.

THE APPEAL BEFORE US

[18] The learned deputy public prosecutor ('DPP') submitted that the High Court judge had erred in concluding that the prosecution had failed to

establish a prima facie case under s 302 of the PC. The respondents' act in causing various injuries upon the deceased amounted to murder as defined under s 300 of the PC.

[19] The prosecution further argued that since all the respondents had pleaded guilty to the amended charge, the actus reus, which is the act of causing the injuries to the deceased, is no longer in dispute.

[20] The learned DPP submitted that the mens rea of the respondents can be inferred by referring to the nature of the injuries sustained by the deceased, especially on the vital parts of the deceased's person and the number and nature of the wounds inflicted. The post-mortem report (exh P5) stated that the cause of death were the slash wounds to the head and the victim had also suffered 20 other marks of trauma on his person.

[21] The weapons used to inflict the injuries would also be relevant to indicate the intention of the respondents. The learned DPP pointed out that PW3 had testified that 'parang', 'besi' and chair were used as weapons (p 90 of *Jld* 1, *RR*), while PW14 testified that a 'parang', a rod or wood and helmet (pp 260–261 *Jld* 3, *RR*) were used in the assault. The murder was pre-planned as the respondents had used PW3 to arrange the meeting with the deceased on the pretext of buying syabu prior to the incident.

[22] The learned DPP further submitted that there were no material contradictions between PW3 and PW14 on the issues as to what were the weapons used. PW3 and PW14 clearly proved the usage of 'parang' and other weapons in the incident. The fact that they did not see which weapon caused the injuries does not in any way undermine their testimonies in respect of what the respondents did to the deceased as witnessed by them.

[23] In addition, the learned DPP submitted that the non-production of the 'parang' would not in any way jeopardised the prosecution's case as it is only a relevant fact and not the facts in issue that constitute murder. Although the murder weapon was not retrieved and produced in evidence, the court can still convict the respondents if there was ample credible evidence to connect all of them with the murder of the deceased (refer to *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195).

[24] It was also submitted that PW3 only disappeared after a lengthy cross-examination. His evidence as to the weapons used and that he was not involved in attacking the deceased remains intact. Attempts were made by the investigation officer (ASP Mohamad Sajidan bin Abdul Sukor, PW13) to

locate PW3 but failed. PW3 is not an accomplice as he did not participate in causing the injuries to the deceased. PW3's evidence need not be corroborated by other evidence or witnesses.

OUR DECISION

[25] We were, by and large, on all fours with the submission of the learned DPP. The discrepancies in the evidence of PW3 and PW14 in the manner enumerated by the learned trial judge are bound to happen in any trial. The discrepancies are minor in nature and did not detract the core issue ie the factual involvement of the three respondents in assaulting the deceased leading to his untimely death.

[26] The contradictions in PW14's oral testimony vis a vis the documentary exhs P4, P176 and P79 are equally insignificant and should not be given exaggerated importance. The documents were not made by him.

[27] We were equally of the view that the non production of the 'parang' in evidence is not fatal. Both PW3 and PW14 alluded to the usage of a 'parang' in the assault of the deceased. Most importantly, PW1's testimony on the slash wounds she found on the person of the deceased corroborated PW3 and PW14's evidence that a 'parang' was used in the assault of the deceased.

[28] On whether PW3 is an accomplice or otherwise, we were of the view that even if PW3 is an accomplice, his testimony was sufficiently corroborated by the evidence of PW14, an independent witness who has no interest in the case, in terms of the involvement of three assailants in the assault of the deceased; on the usage of 'parang', 'besi' and 'kayu' as weapons of assault; and on the presence of the car that was used to flee the scene by the assailants. PW1 also corroborated PW3's evidence that a 'parang' was used in the assault.

[29] However, we were of the view that the achilles heel beseeching the prosecution's case was the disappearance of PW3 in the midst of his cross-examination, which according to learned counsel took place while his crucial cross-examination was about to begin.

[30] In such event the defence is deprived of the right to scrutinise the evidence of PW3, leaving the defence at a disadvantage. It prevents the defence the opportunity to put forward its case or to bring out facts through the cross-examination which may favour the respondents. Admitting evidence from an incomplete cross-examination would tantamount to allowing a witness to escape cross-examination primarily to safe guard his own interest. It

will also casts doubts on the credibility and evidence of the witness. More so when the respondents here contended that PW3 is an accomplice or even the actual perpetrator.

[31] Correspondingly, it raised the issue of whether the defence was afforded the opportunity to test the truthfulness of the evidence of PW3 by cross-examination. In *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61, which was alluded by the learned trial judge, the Federal Court held:

> (2) The opportunity to cross-examine must be a real opportunity. The right to cross-examination was not enough; there must be opportunity to exercise the right. The evidence of a witness which could not be tested by cross-examination was admissible but the weight to be attached to such evidence should depend on the circumstances of each case. The court should look at the evidence carefully to see whether there were indications that a completed cross-examination was likely to seriously shake the testimony. Based on the record of the case, the cross-examination of DW1, the solicitor who had allegedly prepared the will of the deceased, was far from over when he went missing as several areas of the plaintiff's case and many inconsistencies in the evidence of DW1 were not even put to him (see pp 78B–I and 79A); *Maharaja of Kolhapur v S Sundaram Ayyar And Ors* AIR 1925 Mad 497, *Mt Horil Kuer & Anor v Rajab Ali & Ors* AIR [1936] Pat 34 and *Diwan Singh v Emperor* AIR [1936] Lah 561 followed.
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> (3) On the facts of this case, if the cross-examination of DW1 had been completed, the indications were that his credibility would have been shaken. This was in view of the contemporaneous evidence and the fact that the exchange of letters between DW1's firm and the solicitors for the defendant took place in suspicious circumstances. The learned judge had taken a very charitable view of DW1 and his affairs without really testing his evidence against the totality of evidence or the probabilities of the case. Very little weight therefore should have been attached to DW1's evidence (see P 79B-H).

(See p 78 (paras A–I) and p 79 (paras A–H) for the full purport of the ruling).

[32] The findings of the learned trial judge in respect of the incomplete cross-examination of PW3 at pp 501–503, *Jld* 5, *RR* is reproduced in extensor hereto for purposes of clarity:

> On the facts of this case, if the cross examination of SP3 had been completed, the indication was that his credibility would have shaken. This was in view of the contemporaneous evidence and the fact that the exchange of appointments between SP3 and the three OKT with the deceased for the purchase of syabu took place in suspicious circumstances. This Court had taken very charitable view of SP3 and his affairs without really testing his evidence against the totality of evidence or the probabilities of the case. Very little therefore should have been attached to SP3's evidence.
>
> The prosecution version that SP3 has gone missing because SP3 was very scared and being harassed by the family members of the OKT, as much as I want to believe,

does not hold water as SP3 had never lodged a police report to the effect. Furthermore, the Investigating Officer had given evidence that the brother of SP3 had contacted SP3 via an unknown number and SP3 had informed the brother that he is fine and there was no need to worry for his safety.

The only conclusion that can be drawn from this is that, SP3 had gone missing voluntarily. At this juncture, this court is in tandem with the contention of the defence counsel as adverse inference should not only be against the prosecution for it's not the fault of the prosecution that SP3 is missing but an adverse inference should be drawn against SP3 himself as he had gone missing when questions were put to him during cross examination on his involvement and culpability in the murder of Apek.

It is also pertinent for me to note the role played by SP3 in this case. SP3 in the humble view of this court had painted a picture of himself as an independent witness and totally innocent. The inquisition that still lingered in my mind is that, why should he, as claimed to have no ill-will against the victim, lie to the victim that he will be coming alone when he was never instructed to do so by the OKT.

...

...

SP3 also confirmed that he was never instructed nor threatened by the OKT to lie to Apek. Since SP3 is a witness who had fled away half way through, it is very important for this court to scrutinise his evidence in further details. It is clear from my point of view at this juncture that somehow I view this particular witness as someone very suspicious, questionable and in a way had something up his sleeves to lie to the deceased to fish him out.

[33] We have no real issue with the assessment of the credit worthiness of PW3 by the learned trial judge in the light of his incomplete cross-examination coupled with other unsatisfactory features of PW3's testimony. She opined that on the facts, had the cross-examinations been completed, the indication was that PW3's credibility would have been shaken. It is essentially her sole province on account of her audio visual advantage of having seen PW3 testifying before her.

CONCLUSION

[34] In the final analysis we were with the learned trial judge that the parameters of establishing a prima facie case against the three respondents on the original charge has not been met by the prosecution. On the totality of the evidence, the learned trial judge had correctly amended the charge against the respondents to one under s 304(a) of the PC. Hence, we dismissed the public prosecutor's appeal without more and affirmed the convictions and sentences handed down therein.

Appeal dismissed; convictions and sentences by learned trial judge affirmed.

Reported by Dzulqarnain Ab Fatar